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Supreme Court of the United States.

OCTOBER TERM, [redacted] 1969

No. [redacted] 128

ARNOLD TOURS, INC., ET AL.,
Petitioners,
v.
WILLIAM R. CAMP ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF SOUTH SHORE NATIONAL BANK IN OPPOSITION.

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[redacted]

Table of Contents.

Question presented	1
Statement	1
Argument	4
Conclusion	10

Table of Authorities Cited.

Cases.

Alabama Power Co. v. Ickes, 302 U.S. 464 (1938)	7
Flast v. Cohen, 392 U.S. 83 (1968)	6
Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1968)	10
Inland Waterways Corp. v. Young, 309 U.S. 517 (1940)	9
M'Culloch v. Maryland, 4 Wheat. 316 (1819)	9
Railroad Co. v. Ellerman, 105 U.S. 166 (1881)	7
Saxon v. Georgia Association of Independent Insurance Agents, Inc., 399 F. 2d 1010 (1968)	9
Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U.S. 118 (1939)	7

Statutes.

5 U.S.C. § 702	3
12 U.S.C. §§ 21, 22 and 26	8
12 U.S.C. § 24 (7)	8
12 U.S.C. § 36 (c) (1) and (2)	8
12 U.S.C. § 92	8
12 U.S.C. § 92a	8

Glass-Steagall Act, 1933, 12 U.S.C. §§ 24, 78, 377 and 378 8

Bank Service Corporation Act, 76 Stat. 1132 8

MISCELLANEOUS.

12 C.F.R. § 7.1 (1959), 24 Fed. Reg. 1900 2

Comptroller's Manual for National Banks, par. 7475 2

28 Encyclopedia Americana 621 (Int. Ed. 1967) 2n.

1957, H.R. 5415 5

1959, H.R. 2424 5

1963, H.R. 9548 5

1965, H.R. 112 5

1967, H.R. 11077 5

1969, H.R. 6778 5

Supreme Court of the United States.

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ARNOLD TOURS, INC., ET AL.,
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v.
WILLIAM B. CAMP ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF OF SOUTH SHORE NATIONAL BANK IN OPPOSITION.

Question Presented.

Does alleged economic injury which results from competition, in and of itself, confer standing on the alleged injured business to question the legality of any aspect of its competitor's operation?

Statement.

The gist of the broad sweep of the complaint is that the Comptroller of the Currency illegally authorized national banks to engage in the travel-agency business and that national banks therefore engage in illegal competition in furnishing travel services.

Furnishing travel services[1] has been a part of banking for nearly one hundred years (Affidavit of MacLeod, R. 28).[2]

Furnishing travel services is similar in nature to many other incidental services commonly performed by banks without specific statutory authority (Affidavit of Camp, R. 14-15).

A 1959 interpretative ruling of the Comptroller, Title 12 C.F.R. c. 1, part 7, Interpretation, § 7.1 (Affidavit of Camp, R. 13), was published in the Federal Register, vol. 24, p. 1989, in March of 1959, and provided in pertinent part:

> "It appears clear that national banks may, as an incidental power, provide travel services for their customers, as they have been doing for many years, and that they may have the reasonable rights and benefits that flow therefrom. . . .
>
> ". . . Ray M. Gidney
> "Comptroller of the Currency."

Comptroller Ray M. Gidney in 1959, after thorough study, thereby formally reaffirmed approval for national banks to provide travel services.

Paragraph 7475 of the Comptroller's Manual for National Banks (Pet. 44), provides:

> "7475. National banks acting as travel agents.
> "Incident to those powers vested in them under 12

[1] Wells Fargo and Company was well established in banking and express (cargo and passengers) about the time of the enactment of the National Bank Act in 1864. 28 Encyclopedia Americana, 621 (Int. Ed. 1963).

[2] References indicated "R" are to appendix to brief for plaintiffs, appellants, filed by the petitioners in the Court below. References indicated "Pet." and "Pet. App." are to the petition and to the appendix to the petition, respectively, filed by the petitioner in this Court.

U.S.C. 24, national banks may provide travel services for their customers and receive compensation therefor. Such services may include the sale of trip insurance and the rental of automobiles as agent for a local rental service. In connection, therewith, national banks may advertise, develop, and extend such travel services for the purpose of attracting customers to the bank. See ¶ 7376".

The District Court granted the defendants' motions for summary judgment on the grounds that the plaintiffs lacked standing to maintain the action (Pet. App.). On appeal, the Court of Appeals for the First Circuit affirmed on the same grounds (Pet. 12-24).

In its opinion (Pet. 12-24), the Court below held that an ordinary competitor has no standing to complain of a party's lack of legal authority to engage in his business unless:

a. The competition is unlawful apart from considerations of corporate power or authority; or

b. the complainant has a "legal right" to be free from the particular competition arising out of exclusive franchise, restrictive license or the like; or

c. the complainant has some "statutory aid to standing" including "judicial review" of the particular administrator in question for "parties aggrieved," "adversely affected" or the like (Pet. 14-16).

Both the District Court and the Court below held that the Administrative Procedure Act, 5 U.S.C. § 702, does not confer standing on the petitioners (Pet. App., Pet. 18-19).

Both Courts, in effect, held that the petitioners do not qualify for any of the special categories wherein a complainant has standing to attack his competitor's right to compete.

Furthermore, the petitioners admit that they ". . . are not the beneficiaries of a license, franchise, immunity statute or monopoly . . ."; that ". . . there is no specific statute protecting plaintiffs from competition . . ."; and that ". . . there are no express laws prohibiting national banks from engaging in the travel business . . ." (Petitioners' Brief, pp. 6 and 18).[3]

Argument.

Petitioners summarize that there are "many reasons why this case should be reviewed" (Pet. 8-9). They argue:

> "First, there are conflicting federal decisions on the main issue of standing as it relates to national banks and there are conflicting federal decisions on the subsidiary issue of standing relating to the interpretation and application of the *Flast* case and the Administrative Procedure Act, Sec. 10(a).
>
> "Second, this case involves an important federal question of national magnitude and of grave concern to our economic leaders. The time is ripe for a national decision involving the national banks."

Petitioner's second point, of which we shall treat briefly first, is irrelevant. ". . . [F]ederal question[s] of national magnitude and of grave concern to our economic leaders," where economic policy rather than law are involved, come within the jurisdiction of Congress. National decisions involving the national banks are and should be made only by the Comptroller of the Currency or by the Congress or by both—not the courts.

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[3] These admissions are from the plaintiffs' brief filed in the Court below, a certified copy of which is filed herewith.

Petitioners must have well recognized this principle when they appeared before the House Committee on Banking and Currency as recently as May 2d to press vigorously for congressional action in the area of their concern (Hearings on H.R. 6778; Bill to amend Bank Holding Co. Act of 1956). This is the sixth attempt to induce Congress to act in this area. Since 1957, five bills have been unsuccessfully introduced in Congress to limit banks' powers including engaging in the travel-agency business (1957, H.R. 5415; 1959, H.R. 2424; 1963, H.R. 9548; 1965, H.R. 112, and 1967, H.R. 11077). These bills were referred to the House Committee on Banking and Currency and were never acted upon. Congress has had ample opportunity to act and has remained silent.

The petitioners do not distinguish between the economic merit of competition offered by national banks, the determination of which rests in the sole discretion of Congress, and the legal propriety of such competition which can only be reviewed by the courts after Congress has spoken.

Unless this Court is going to substitute itself for the Congress in deciding what policies should govern national banks, and whether or not travel agents are entitled to court protection from competition offered by national banks, this second reason given by the petitioners for requesting the Court to review this case is unfounded.

Their first reason that ". . . there are conflicting federal decisions on the main issue of standing as it relates to national banks . . ." runs head-on into the decisions of the District Court and the Court below.

Far from involving an important and novel question, this case is merely an example of the well-settled principle that mere unwanted competition does not give a complainant the right to compel the courts to police the marketplace.

The decision below involves no federal question in conflict with applicable decisions of this Court or any Court

of Appeals. On the contrary, the Court below has carefully sorted the pertinent decisions to illuminate the three paths which can lead to judicial review: illegal competition, invasion of a legal right to be free of the particular kind of competition, and statutory aid to challenge the particular kind of competition.

The petitioners point to no real conflict. Instead, they ask this Court, using *Flast* v. *Cohen* (1968), 392 U.S. 83, as a springboard, to jump to a conclusion that any time competition *per se* creates alleged adversity, standing is automatically conferred on a complainant. Such a holding would require a preliminary and anomalous finding that increased competition is an injury in fact. Allusion to the difficulty of this determination was made by the Court below in footnote 7 of its opinion (Pet. 19).

Applying the first category for standing, the petitioners fail to show that the act or manner of competing by the respondents is "illegal." "Plaintiffs do not suggest that the Comptroller has sanctioned, or that the bank has undertaken, any unfair, conspiratorial, or criminal methods of competition, or that there has been any violation of the antitrust laws" (Opinion, Pet. 15).

Related to this legal approach, a similar line also leads to the conclusion that the petitioners do not have standing. By their admissions, the petitioners have shown that there can be no illegal competition, in and of itself, in the travel business. They try to manufacture "illegal competition" out of their claims that national banks engage in the travel business without authority, that is, acting *ultra vires*. They do not distinguish between "illegal competition" and "acting ultra vires" as the courts have done. It has been conclusively held that competitors in a nonexclusive field have no right to seek protection from competition from others, even though the acts of the others are *ultra vires*

and not properly authorized. This was set forth in *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), quoting at page 482 from *Railroad Co.* v. *Ellerman*, 105 U.S. 166:

> "'But if the competition in itself, however injurious,' we said, pp. 173-174, 'is not a wrong of which he could complain against a natural person, being the riparian proprietor, how does it become so merely because the author of it is a corporation acting *ultra vires*?' The damage is attributable to the competition, and to that alone. But the competition is not illegal. It is not unlawful for any one to compete with the company, although the latter may not be authorized to engage in the same business.'"

See *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 139-141 (1939).

Thus it is plainly clear that, even if petitioners could show that national banks were not granted the power to engage in the travel-agency business and that therefore the banks' activities are *ultra vires*, nevertheless, the petitioners cannot maintain this action because there is nothing that makes competition in the travel-agency business illegal.

The second category is where petitioners claim a "legal right" to be free from competition arising, generally, out of an exclusive franchise or a restricted license or the like. The petitioners claim no such exclusive right and even admit they have none (*supra*, p. 4). As the Court below said, "Plaintiffs fit in no such category." (Opinion, Pet. 15).

The final category requires that the complainant show that he has some "statutory aid" to standing. Decisions proscribing the activities of national banks in various fields of competition have relied upon specific, relevant statutes,

in the absence of which no standing would have existed. Those cases are readily classified under six different types of statutes.

They are:

(a) National Branch Banking.
Statute: 12 U.S.C. § 36 (c) (1) and (2).

(b) Chartering of National Banks.
Statute: 12 U.S.C. §§ 21, 22 and 26.

(c) Securities underwriting.
Statute: 12 U.S.C. § 24 (Seventh), and Glass-Steagall Act, 1933.

(d) Commingled investment accounts.
Statute: 12 U.S.C. § 92a, state banking law, and Glass-Steagall Act, 1933, 12 U.S.C. §§ 24, 78, 377 and 378.

(e) Insurance Agents, population under 5,000.
Statute: 12 U.S.C. § 92.

(f) Data Processing.
Statute: Bank Service Corporation Act, 76 Stat. 1132 (Wingate, Opinion, Pet. 21-23).

None of these statutes is claimed by or avails the petitioners. Therefore none of the decisions relying on these statutes could be in conflict with the decision of the Court below.

The most the petitioners can rely on is their interpretation of subparagraph 7 of 12 U.S.C. § 24, which, in relation to the power of a national bank, states in pertinent part: ". . . it shall have power . . . Seventh. To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking . . ." It is interesting to note in passing that the Supreme Court definition of "necessary," first enunciated by Chief Justice Marshall (*M'Culloch* v.

State of Maryland, 4 Wheat. 316, 413 (1819), and still in effect, is: "If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another."

The petitioners cite no case in which a national bank has been prohibited from any field of competition *solely* upon this part of the statute. They cite nothing to show a congressional intent under this statute or any other statute to protect the travel business from competition by national banks or to limit such activity by national banks.

As the Court below pointed out (Pet. 17-18), Congress intended these limitations to be for the purpose of insuring the stability, liquidity and safety of the banks—not to protect competitors.

When in doubt as to whether or not the particular inhibitive statute was intended to protect others from competition from national banks, the courts have looked to congressional history and other statutes to judge the intent of Congress. See *Saxon* v. *Georgia Association of Independent Insurance Agents, Inc.*, 399 F. 2d 1010, 1017 (5th Cir. 1968). Congress has been faced with real, organized effort to amend the statute. And as previously set forth (*supra*, p. 5), Congress has had ample opportunity to act and has remained silent.

In any event, ". . . when legality itself is in dispute—when Congress has spoken at best with ambiguous silence—a long continued practice pursued with the knowledge of the Comptroller of the Currency is more persuasive than considerations of abstract conflict between such a practice and purposes attributed to Congress." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524 (1940).

The petitioners having failed to fit in any of the three criteria mentioned, the words of this Court in 1968 in *Hardin*

v. *Kentucky Utilities Co.*, 390 U.S. 1, 5-6, answer the question presented:

> ". . . [E]conomic injury which results from lawful competition *cannot*, in and of itself, confer standing on the injured business to question the legality of any aspect of its competitor's operations." (Emphasis supplied.)

Finally, this respondent submits that this case and these facts offer no cause for review by this Court, unless, under the guise of the petitioners' hoped-for new doctrine of "competitor standing," this Court desires to consider that the "standing categories" should be abolished. Were this to happen, every competing business, large or small, would have the right to complain in the courts against the acts of its competitors, and existing limitations on untrammeled litigation would disappear.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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